No. 22423

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs

WESTERN BUILDING MAINTENANCE COMPANY AND SERVICE AND MAINTENANCE EMPLOYEES UNION, LOCAL 399, BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Respondents.

Brief for Respondent, Service and Maintenance Employees Union, Local 399, Building Service Employees International Union, AFL-CIO.

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Statement of Facts.

A Complaint was issued by the Regional Director against Service and Maintenance Employees Union, Local 399, AFL-CIO, hereinafter called "Union," and the Western Building Maintenance Company, hereinafter called "Western Building," based on a charge filed by Anthony Doria, President of the Charging Party, International Union, Confederated Industrial Workers of America. The Complaint included as parties in interest sixty-three other maintenance companies. An Answer was filed by the Union and Western Building. Hearings were held on February 16 and 17, 1966, and March 10, 1966. The Trial Examiner issued a Decision on September 12, 1966, finding that the Union and West-

ern Building were in violation of the Act, and recommended a remedial order.

On January 10, 1967, the National Labor Relations Board, hereinafter referred to as the "Board," issued its Decision and Order. The Board adopted the findings, conclusions and recommendations of the Trial Examiner.

A. The Evidence Established at the Hearings Was, For the Most Part, Undisputed, and Consisted of Written Stipulations and the Testimony of One Witness.

The Untion represents janitors, janitresses, and general custodian workers in the Southern California area. The Union and the sixty-three maintenance companies, originally named as parties in interest, as well as Western Building have been parties to a series of collective bargaining agreements going back many years. Each maintenance company was signed to the identical agreement that established uniform wages, hours and working conditions for employees working in this industry in the Southern California area. The Agreement that is the subject matter of the case was in effect from August 1963 to August 1966 [General Counsel's Ex. 3].

The Agreement contained a lawful Union security clause that required the employees to become members of the Union as a condition of employment after thirty (30) days of employment. All the parties stipulated, and the General Counsel did not challenge the legality of the Union security clause in the Agreement. The Board held that the Union security clause was a lawful provision.

The Board found that the Union and Western Building and the Employers that were not dismissed as parties

in interest, did restrain and coerce new employees upon their hiring, on a finding that there was a practice that each new hired employee was coerced and restrained to pay dues to the Union during the first thirty days of employment.

The General Counsel dismissed the Complaint as against forty-five of the sixty-three maintenance companies that were originally named as parties in interest. It was stipulated that the reason the General Counsel dismissed the complaint as to the forty-five maintenance companies was that such companies either did not meet the jurisdictional standards of the Board, or did not engage in any practice involving the collection and payment of dues by new employees during the first thirty (30) days of employment of new employees [Tr. p. 31].

The only testimony at the hearing was that of Mrs. Juliann Werle who was the Personnel Manager of American Building Maintenance Company [Tr. pp. 16-30]. The balance of the case was submitted on stipulations and exhibits.

There was a stipulation that the eighteen companies that remained in the case as parties in interest engaged in a wide variety of practices. The stipulation set forth that there were many different statements or no statements at all were made to new employees concerning Union membership and the signing of dues check-off cards and the collection of dues during the first thirty days of employment. The Union will discuss, at a later point in this brief, the differences in the practices which was entirely ignored by the Board in its decision that all of the companies and the Union engaged in practices that were in violation of the Act [General Counsel's Ex. 8].

ARGUMENT.

1. The Board Was in Error in Finding That the General Counsel Had Sustained the Burden of Proof Required to Show That Any Conduct on the Part of the Union Was in Violation of the Act.

There is no need to cite numerous authorities to the effect that in an unfair labor practice proceeding, the General Counsel has the burden of proving that the Respondent has committed an act or is engaged in any conduct that is in violation of the Act. The Union submits that the Board was in error in ignoring the amount of proof required and the burden that must be sustained by the General Counsel. The decision of the Board, in effect, shifts the burden of proof to the union and is based on speculation and deductions that are not based on any evidence in the record. Specifically, the Board reached a general conclusion as to a pattern of conduct by the Union based on stipulations in the record and ignored the fact that the practices between the various employers differed drastically and the Board completely failed to draw a distinction between the various practices engaged in by the various Employers. The Board, in effect, took the practices of one or two employers and ignored the practices of the other employers and from the practices of one or two employers, reached a general conclusion that the Union had engaged in conduct in violation of the Act. Such a method of reasoning, the Union submits, does not sustain the burden of proof that is required.

The only evidence in the record that in any way relates to any conduct on the part of the Union consists of the two notices sent by the Union to all of the main-

tenance contractors [General Counsel's Exs. 4 and 5], and some general stipulations that statements and audits were made to the effect that the dues were twenty-five cents per day [Counsel's General Ex. "A"].

The notices sent by the Union merely rephrased the language of the applicable Agreement which the General Counsel conceded and the Board specifically found contained a lawful Union security clause. The notices by its language do not contain any demands or statements of policy that a new employee should not be hired unless the employee agreed to pay Union dues during the first thirty days of employment. The law is very clear, and there is no doubt that an employee can voluntarily agree to join the Union at the time of hire and pay dues during the first thirty days of employment. A violation of the Act would exist only if a new employee was coerced or threatened to the effect that he is told that as a condition of employment, he must pay Union dues during the first thirty days and that if he did not agree to pay such dues, he would not be hired by the employer. There is nothing in the language of the notices sent by the Union that in any way consists of the type of demands or conduct that is required to prove a violation of the Act to the effect that the Union insisted and required the employer to set forth as a condition of hire that the employee must join the Union and pay Union dues during the first thirty days of employment.

The stipulation [General Counsel's Ex. 8] sets forth that representatives of the Union did speak to four employers reminding them that dues for the first thirty days of employment were twenty-five cents per day. The fact that the Union did remind several employers

of the exact amount of dues is not proof that the Union coerced, insisted or demanded that an employee should not be hired unless the employee agreed to pay Union dues during the first thirty days of employment. The Union has a right to set forth dues and to accept such dues for an employee who joins the Union at the time of his hire or before the end of the thirty-day period and signs a dues check-off authorization card. The fact that the Union accepted such dues is not sufficient proof to sustain a finding and to satisfy the burden of proof that the Union engaged in any illegal conduct to obtain such dues.

The stipulation [General Counsel's Ex. 8] sets forth in great detail that there were various and different practices by eighteen out of the sixty-four maintenance employers that were signed to the Standard Maintenance Agreement and who received the identical notices from the Union. In most instances, the employers did not say anything to the new employees. Any statements made upon hiring of new employees were, for the most part, vague, general and varied substantially between the employers. It is important to point out that the General Counsel did not offer any substantial evidence and the Board was not able to base its findings on any substantial evidence that the Union was responsible for any of the ambiguous and general statements made by a few employers upon hiring new employees. The Board found the Union in a violation of the Act based solely on speculation and conclusions drawn from the conduct of other parties and from a general suspicion that the Union may have engaged in such illegal conduct. However, the Courts should not uphold a finding of a violation of the Act

based upon speculation which is not supported by substantial evidence.

The Ninth Circuit Court of Appeals in *National Labor Relations Board v. Meatcutters Local Union,* 202 F. 2d 671, refused to enforce an order of the Board finding that a Union had discriminated against an employee in violation of Section 8(b)(2) of the Act. The Court stated that the Board's Order was not supported by sufficient evidence and the Board cannot arrive at any conclusion based only on hearsay and speculation. The Court, in this regard, stated as follows:

> "Notwithstanding this want of anything but hearsay to support this particular portion of the Complaint against the Union, the trial examiner arrived at his conclusion by saying: 'However, the circumstances set forth in the evidence establish in the case E. A. Wyatt Gearhart *must have* been *told* by the Union that the Union objected to the continuation of Wyatt's Employment.' (Emphasis Added) The Board is not permitted to arrive at conclusions based on such speculations."

In *National Labor Relations Board v. Thomas Rigging Co.,* 211 F. 2d 153, the Court refused to enforce an order against a Union based on a finding of the Board that the Union had discriminated against employees in violation of the Act, as the Board's Order was not supported by sufficient evidence. In this regard, the Court stated as follows:

> "We do not lose sight of the fact that we should not substitute our judgment for that of the Board as to the credibility of witnesses or reasonable in-

ferences drawn from the testimony, but we are functioning within our proper sphere when we say that mere speculation is not sufficient to uphold a finding of an unfair labor practice.

The United States Supreme Court has, on several occasions, cautioned the Board that the Board cannot find a violation of the Act concerning discrimination in hiring unless there is substantial evidence to support the order. In *Local 357, Teamsters v. National Labor Relations Board,* 365 U.S. 667, 47 LRRM 2909, and *National Labor Relations Board v. News Syndicate Co.,* 365 U.S. 695, the Supreme Court held that discrimination by a Union cannot be inferred without evidence establishing such a fact and the Board cannot reach conclusions based on speculation only.

2. The Fact That Only Nineteen (19) Out of Sixty-Four (64) Employers Are Involved Required a Finding That the Union Did Not Cause the Employers to Require New Employees to Pay Dues During the First Thirty (30) Days of Employment as the Agreement and Notices and Practices Are on an Industry-Wide Basis.

If the Union did participate and require the employers under the Agreement to require as a condition of hiring, the payment of Union dues during the first thirty days of employment, then it is strange that out of the sixty-four employers, only nineteen are alleged to have engaged in violating the Act. It is true that some of the companies were dismissed because of lack of jurisdiction; however, many of the companies did meet the jurisdictional standards of the Board, but did not collect any dues during the first thirty days of

employment. If the Union intended a violation of the Act by the notices and the alleged practice, it is curious that the Union did not enforce its demands as against all the employers that are signed to the Agreement. The Union had the right under the Agreement to strike, file a lawsuit, or proceed to arbitration against any employer that the Union claimed was in violation of the Agreement. If the Union intended a practice of requiring the payment of such dues, the Union would have taken some action against the employers that did not collect such dues. The fact that the Union did not proceed against such employers and the fact that so many employers did not collect such dues, supports a finding that the Union cannot be responsible for the fact that some employees did pay dues during the first thirty days of their employment. The Union had a right to assume that coercion was not exercised by any employer.

The Trial Examiner, in his decision (p. 20, lines 20-35), dismisses this point on the basis that there was proof concerning the nineteen employers and what practice existed concerning the other forty-five maintenance contractors is not relevent. However, the Trial Examiner devotes a considerable portion of his decision attempting to show a wide-spread practice and custom by the Union in order to find some proof of coercion or restraint. In the absence of specific evidence, the Trial Examiner was forced to rely on a conclusion based on a custom or practice. If a custom or practice is to be used as a basis for a finding of illegal conduct, then the Trial Examiner should have used the custom and practices of the entire industry and involve all of the employers that were signed to the identical agreement. The Union submits that when a practice is legal, at least as to forty-five employers, that a find-

ing of illegal conduct cannot be based upon speculation involving the remaining nineteen employers, and that the overall practice is relevant in determining the motivation's and the intentions of the Union in its conduct. A reasonable and substantial conclusion that can be drawn from the testimony is that the Union did not engage in illegal conduct based on the fact that if the Union tended to coerce or restrain the new employees then such restraint or coercion would apply as against all of the employers that were signed to the identical Agreement. There is no evidence in the record nor any basis for any finding as to why the Union would select less than a majority of the maintenance contractors, specifically nineteen out of forty-five employers, to develop any illegal conduct.

3. The Stipulation Sets Forth That There Was a Difference in Practice Between the Employers That Are Parties in Interest.

Paragraph 2 of the Stipulation [General Counsel's Ex. 8] sets forth that some employers told job applicants that in order to be employed they must join Local 399 and pay Union dues. This statement alone is not coercive or threatening as the Agreement did provide for a legal Union shop and that employees would have to join the Union after thirty days and pay dues. This statement does not contain any evidence that new applicants were told that they must join upon hiring and pay dues during the first thirty days of employment.

The Employers specified in paragraph 3 of the Stipulation [General Counsel's Ex. 8] did not state when the employees had to join the Union or when dues would be taken out of the employees pay or the amount of

the dues. The Employers cannot be held to have coerced new employees in any manner by such statements.

All-State Building told its new employees that they did not have to join the Union until after thirty days and that no dues would be deducted during the first thirty days of employment [General Counsel's Ex. 8, par. 4]. This statement clearly shows that this employer did not violate the Act and, in fact, correctly advised its new employees.

Royal Building Maintenance informed its job applicants that in order to become employed they must join the Union, but no dues would be deducted until after 30 days of employment. Again, this statement to new applicants was legal and proper and doesn't prove a violation of the Act.

In fact, there is no statement by any employer, except Coast Building, that any dues would be deducted during the first thirty days of employment. The fact that the employer may have given forms to sign cannot alone support a finding of illegal conduct.

It is important to point out that Western Building did hire new employees, although such employees refused to join the Union or pay any dues until after thirty days of employment. The practice of hiring such new employees even though such employees decided not to join the Union until after thirty days is clear proof that Western Building and the Union did not coerce or require a new employee to join the Union and pay dues during the first thirty days of employment as a condition of hiring.

Based on the record, there is no evidence that in any way will support a conclusion that any of the

employers acted in violation of the Act and consequently if such employers did not engage in any illegal practices, the Union cannot be held liable. On the contrary, the evidence establishes that the employers merely handed the forms to new applicants without any coercive statements.

All-State specifically told its applicants they did not have to join the Union until after thirty days and no dues would be deducted during the first thirty days.

Coast Building told its job applicants that they had thirty days to join the Union.

Royal Building told its job applicants that no dues would be deducted until after thirty days of employment.

All American, Esquire, Los Angeles and Nielson did not say anything to job applicants at the time of hiring and only distributed the forms after thirty days.

Western Building, by its hiring of applicants who refused to sign any forms, establishes that Western did not condition hiring upon the signing of such forms.

Other employers, engaged in the practice of not saying anything to its job applicants, but merely gave each applicant the forms.

There is no illegal conduct involved when an employer tells its new employees that the contract with the Union contains a Union shop and that the employees will have to join the Union. The General Counsel in order to prove his case, must show by affimative and substantial evidence that the employer and the Union required a new applicant to join the Union at the time of hire and pay dues during the first thirty days of employment. Such substantial evidence has not been presented in this case.

The Trial Examiner, in the decision starting at page 14, line 40, and through page 15, and page 16 up through line 10, sets forth the differences in practices concerning the nineteen maintenance contractors that were set forth in the stipulation [General Counsel's Ex. 8]. The Trial Examiner totally ignores the differences in practices, and fails to distinguish between the practices of the various employers. It is possible, although the Union does not concede it, that some of the employers may have made some statements that conditioned employment upon joining the Union and paying dues within the first thirty days. However, there is no doubt that some of the employers clearly did not coerce or restrain their new employees, and that new employees were hired and did work even though they did not pay Union dues and did not join the Union and were in no way coerced or required to join the Union during the first thirty days. The Board's decision totally fails to distinguish between the employers as to their various practices. Instead, the Trial Examiner merely adopts the conclusion of the General Counsel which has no basis in the record, and states "As the General Counsel asserts in his brief, it is difficult to conceive of conduct more coercive that the imposition as a condition of employment of a requirement of Union membership and the signing of a check-off, during the first thirty days of employment, even where a lawful Union security provision is in effect." The Trial Examiner and the Board reach the conclusion that the conduct contained an imposition as a condition of employment, but does not set forth the facts to support such a conclusion.

4. **The Applications for Membership and Dues Check-Off Cards Signed by New Hires Contains Clear Language That the Applicants Signed of Their Own Free Will.**

The forms submitted to new employees contained an application card for membership in the Union and a payroll deduction authorization card. The application for membership card states "I, of my own free will, hereby apply for membership in the Service and Maintenance Employees Union, Local 399 of Los Angeles . . ." The payroll deduction authorization card states. "I hereby certify that this authorization is made freely and without any inference, restraint or coercion from any person or persons whatsoever."

It must be assumed, that a new applicant, when he signed a card, read the card and understood what he was signing. The General Counsel attempted to show that the educational level of such employees were low and that such new employees were not capable of reading or understanding what they signed. Such a conclusion cannot be made from the evidence. There was no testimony presented that any employee was not capable of reading or understanding what he signed. In the absence of specific testimony, the only inference that can be drawn is that an adult who signs a card is able to read and understand what he signs. For this reason, the application for Union membership and the payment of dues was a voluntary act on the part of each new employee.

The Board dismisses this point on the basis that the Union did not make any showing "that any of the newly hired employees read these forms before signing them, and, and in view of the fact that they were told that employment was contingent upon their signing the forms, it is wholly unrealistic to believe that the employees would have been deterred from signing by the self-serving statement placed there by the Union." (Trial Examiner's Decision, page 17, lines 35-40). This statement of the Trial Examiner again shows that the Trial Examiner is not basing his conclusions on any substantial evidence in the record. This statement, as quoted above, is based on a conclusion "in view of the fact that they were told that employment was contingent upon their signing the forms . . ." which is the conclusion urged by the General Counsel, but is totally lacking in evidence in the record. Another error by the Board in adopting the Trial Examiner's Findings is that the Trial Examiner apparently adopted the unusual position of requiring that the Union had the burden of proving that newly hired employees read the forms that were presented to them. The stipulation submitted that the language to the effect that the signing of the cards was voluntary, was clearly legible on the card and was in simple and understandable English. It can only be assumed that when a card contains language which is clear and in Egnlish, that a person signing such a card has read and understood the language. Instead, the Board would have the Union sustain the burden of proof of showing that the many

hundreds of new applicants that were hired failed to read the card or failed to understand what was on the card.

In *National Labor Relations Board v. Englander Co.,* 260 F. 2d 67, the Ninth Circuit refused to enforce an Order of the Board, in part, relating to hiring and the joining of a Union until after thirty-one days of employment. In this regard the Court stated as follows:

> "The Union agreement which had been theretofore on February 15th or 16th entered into between Englander and the Teamsters contained a security-clause which required all employees to join the Union after 31 days employment. Taking this conversation at its face value (although denied by Moore), the conversation would just as reasonably have referred to the requirement of the security clause to join the Teamsters *after* 31 days employment as the construction placed on it by the Board that it required joining the Teamsters *before* the employment. If it had the former construction, it was of course perfectly legitimate under the security clause."

The Board, in *Jomare Metal Finishing,* 147 N.L.R.B. 129, refused to grant the General Counsel a general reimbursement of dues remedy on the basis that the record was devoid of any facts or evidence that employees were coerced to join the Union or sign check-off authorization cards.

In *S. Klein Department Stores,* 149 N.L.R.B. 49, the Board held that an employer had a right to advise his employees that a contract with a labor organization, requires them to join the Union pursuant to a Union security clause.

The Board relies heavily on the case of *Campbell Soup Co..,* 152 N.L.R.B. 165 and the decision of the Ninth Circuit where the Board order was enforced. See *N.L.R.B. v. Campbell Soup Co. and Butcher's Union, Local 127, Amalgamated Meatcutters and Butcher Workmen of North America, AFL-CIO,* 378 F. 2d 259 (C. A. 9), cert denied, 389 U. S. 900.

The Ninth Circuit, in the *Campbell Soup* case, enforced the Board's order based on issues that are not involved in the present case. The attack on the Board order in the *Campbell Soup Company* case was based on a decision of the Board where the Board did not give effect to a settlement agreement and, in addition, the Ninth Circuit Court rejected the employer's attack on the Board's order where the Board found the employer jointly liable with the Union regarding the remedy. Neither of these two issues are present in this case. However, an analysis of the facts and the findings in the *Campbell Soup* case by the Board regarding the findings of violations of 8(b)(2) and 8(a)(2) and (3) of the Act are applicable here. The Union submits that there are substantial differences between the facts and the practices in the present case, and the situation in the *Campbell Soup Company* case. In the *Campbell Soup Co.* case, the Board found, by substantial evidence which only involved one company and one personnel practice, that each new hire was told by the personnel manager that they must join the Union and pay dues during the first thirty days of employment. The testimony established that this was the practice of the company and that such statements were clearly made by the employer and that such statements were made upon the instructions and cooperation with

the Union. There was additional testimony in the record that the employees who were hired understood that they had to join and pay dues during the first thirty days as a condition of employment. Another important factor is that the practice was successful to the extent that virtually every new employee that was hired did join the Union and pay dues during the first thirty days of employment. It is clear that the type and amount of evidence that existed in the *Campbell Soup Co.* case is far different than the proof offered in this case. In this case, there was a specific provision in the cards signed by new applicants that such persons were signing voluntarily and of their own choice. Again, there was a vague, general and different types of statement made by each of the employers. Another important distinction is that the collection of dues was virtually one hundred per cent during the first thirty days of employment in the *Campbell Soup Co.* case. As pointed out, in this case, based on over sixty employers, the practice was not only not successful, but was almost entirely unsuccessful if such a practice did exist. The evidence in this case is clear that only nineteen out of sixty-three employers are still parties in interest, and between the nineteen employers, the practice was so widely different so as to completely refute any wide-spread practice of illegal conduct on the part of the Union.

The present case is similar to *Philide Sherate Corp.* 136 N.L.R.B. 75, and LRRM 1874. Even if some of the employers did engage in coercive conduct, the Union

was not a party to such conduct. In the absence of proof, the Union cannot be held responsible for some general and vague statements that may have been made by an employer upon hiring new applicants.

In *Keller Plastics Inc.,* 157 N.L.R.B. 55, 61 LRRM 1397, the Board states as follws:

> "As to the allegation regarding supervisory solicitation of employees to sign Union authorization and dues checkoff cards, the stipulated facts do not establish that supervisors engaged in such solicitation in a coercive or otherwise unlawful manner, or that employees were advised that they must join the Union before their 30-day grace period had expired. In view of the lawful union-security and voluntary checkoff provisions of the applicable contract, we are unable to conclude on the record before us that the supervisors did more than merely advise employees of their contractual obligations to join the Union and of the availability of the checkoff as a method of paying lawfully required union dues. We therefore find no adequate support for the alleged violations of Section 8(a)(1), (2), or (3) of the Act, based on the aforesaid solicitation."

The Trial Examiner, in his recommended Order, and adopted by the Board refers to the check-off authorization cards. The General Counsel did not challenge the check-off cards and provisions and, in view of the fact that the employees remained in employment past thirty days, there is no basis for a finding of fact concerning the future use of such check-off authorization cards.

Conclusion.

For the reasons stated, it is respectfully submitted that the Board's order should not be enforced.

LEVY, DEROY, GEFFNER & VAN BOURG and
LEO GEFFNER,

By LEO GEFFNER,

Attorneys for Respondent, Service and Maintenance Employees Union, Local 399, Building Service Employees International Union, AFL-CIO.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

LEO GEFFNER.